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No. 97-1353

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

WILLIAM FAZIO, an individual,

Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a local public entity, and ARLO SMITH, an individual,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the job of Assistant District Attorney is a position for which party affiliation is an appropriate requirement for effective performance and, therefore, whether all Assistant District Attorneys may be terminated for the exercise of First Amendment rights without offense to the Constitution.

Bill Fazio, an individual, the plaintiff in the District Court and the appellant in the Court of Appeals, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT IN REPLY TO OPPOSITION BRIEF

In the Court of Appeals below, the Ninth Circuit held that the position of Assistant District Attorney is one for which political affiliation is an appropriate requirement for effective performance, despite the rulings of this Court that the *Pickering* balancing test is to be applied in cases of terminations of public employees in retaliation for the exercise of their First Amendment rights. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

I.

ELROD-BRANTI DOES NOT AUTOMATICALLY APPLY WHEN PUBLIC EMPLOYEES OPPOSE THEIR EMPLOYERS IN ELECTIONS.

Respondents argue that the fact of an employee opposing his employer in an election automatically requires the application of the *Elrod-Branti* policymaking exception. Respondents' Brief at pp. 5-6. However, Elrod-Branti applies when *policymaking* employees oppose their employers in elections. The cases cites by Respondents do not bear out a different conclusion. In *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993), the employee contesting his placement on unpaid leave, a deputy sheriff, was *as a matter of law* in the Seventh Circuit, a policymaker within the meaning of *Elrod-Branti* and thus could be fired for any exercise of his First Amendment rights. *Id.* at 217 (citing *Upton v. Thompson*, 930 F.2d 1209, 1213-16 (7th Cir. 1991) (holding deputy sheriffs to be policymaking or confidential employees)). The fact that

the employee chose to run against his boss did not determine the appropriate test to apply. Rather, the Seventh's Circuit's previous ruling in *Upton v. Thompson* made that determination.

Indeed, the *Wilbur* court made this quite clear:

> If as here the candidate occupies a confidential or policymaking position under the boss, the political enmity that the candidacy is certain to engender entitled the boss to fire him. . . . Once the employee is classified as confidential or policymaking, he can be fired on political grounds even if there is no evidence that he would not serve his political superiors loyally and competently. . . .
>
> *It is different when the employee who is running against or otherwise speaking against his superior is not a confidential or policymaking employee . . . [b]ut in this case we are dealing with a policymaking employee . . .*

Wilbur, 3 F.3d at 218 (emphasis added).

These cases are inapposite because the very issue Petitioner Fazio challenges is the holding by the Ninth Circuit that Assistant District Attorneys are policymakers as a matter of law and fall under the *Elrod-Branti* exception. Respondents' cited authority is would only be relevant *after* this Court makes that determination. If the judgment of the Ninth Circuit is affirmed, then Assistant District Attorneys may be summarily terminated for *any* exercise of First Amendment rights, not just for opposing their employers in an election. If the Ninth Circuit is reversed, then Assistant District Attorneys may only be terminated for the exercise of First Amendment rights only if under the *Pickering* balancing test, the employee's First Amendment rights

are outweighed by the employer's interests in promoting efficiency of the public services it performs. *Pickering*, 391 U.S. at 569.

Contrary to Respondents' assertions, *Elrod-Branti* is not applicable simply because political speech is involved. *See* Respondents' Brief at p. 6. Such a proposition would abrogate the very purpose and holding of *Pickering* which rejects the proposition that a public employee relinquishes his or her rights of freedom of speech and association upon accepting public employment. This is simply not the law as laid down by this Court. As stated by this Court in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990):

> [The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Id. at 72 (quoting *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)).

II.

PUBLIC POLICY AND PRACTICE WARRANT THE REVERSAL OF THE NINTH CIRCUIT.

Respondents argue that if District Attorneys were required to retain as employees Assistant District Attorneys who exercise

their First Amendment rights in a manner which displeased their employers, the voter's right to elect public officials to effect change in their government would be impaired. Defendants' argument is belied by the facts. As judicially noticed by the District Court, Assistant District Attorneys in counties all over California, including Los Angeles, Napa, Sonoma, and Sacramento have been free to run for election against the incumbent District Attorney without being fired or facing retaliation. CR 46. Prior to the Ninth Circuit's ruling, there were numerous races in California where Assistant District Attorneys ran for office against the incumbent and kept their jobs. CR 46. The voters' right was not impaired — to the contrary, the voters were provided with greater choice on election day.

The political self-preservation of incumbent politicians does not warrant the shackling of their employees' political expression, nor does it justify frustrating the electorate's right to choose the from the best candidates. Because the rights of Assistant District Attorneys and of the voters are at stake, the petition for writ of certiorari should be granted.

CONCLUSION

Bright line rules are inappropriate mechanisms for determining the scope of First Amendment rights. *See Board of County Commissioners v. Umbehr*, 116 S. Ct. 2342, 2344 (1996). Nevertheless, the Ninth Circuit has ruled that Assistant District Attorneys may be terminated for any exercise of First Amendment rights. Such a sweeping ruling cannot withstand Constitutional scrutiny. Application of the *Pickering* balancing test will ensure appropriate protection of the First Amendment rights of Assistant District Attorneys. Accordingly, Fazio respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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